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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY AND JOSEPH M. MESNIG, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

vs.

CARL J. SCHMIDLAPP AND ELIZABETH E. GORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EUGENE V. R. THAYER, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SURROGATES COURT OF THE COUNTY OF NEW YORK OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

MORTIMER M. KASSELL,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Mark Graves, John P. Hennessey and Joseph M. Mesnig, as Commissioners constituting the State Tax Commission of the State of New York, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The decedent, Eugene V. R. Thayer, died a resident of the State of New York on January 1, 1937 (R. 29). His will was admitted to probate by the Surrogates' Court of New York County, and letters of administration issued to Carl J. Schmidlapp and Elizabeth E. Gorrie (R. 30). By Paragraph Fifth of said will he exercised a general power of appointment given him under his father's will (R. 77-78).

The trust fund over which the decedent exercised the power of appointment, had been created by the will of his father, Eugene V. R. Thayer, Sr., who died a resident of Massachusetts on December 20, 1907, and whose will was admitted to probate in Worcester County of that State (R. 52). Under the father's will his residuary estate was bequeathed in trust with income therefrom payable to his widow for life and then to his three children for their lives with power in Eugene V. R. Thayer, decedent herein, to appoint by will his share of the principal (R. 104-5).

Decedent was one of three trustees under his father's will of the trust fund and the fund was originally managed as a unit. However, on July 8, 1911, decedent's one-third share of the fund was segregated, with the approval of the other trustees and adult beneficiaries, and was thereafter managed by him as a separate trust although under the nominal trusteeship of all three trustees (R. 53). In 1918, decedent moved to New York, bringing with him his share of the trust fund. While in New York decedent kept the physical evidences of his share of the fund in a safe deposit box in New York City (R. 69). In 1929 he moved to Illinois where he remained until 1934 still having with him his share of the trust fund (R. 71). In 1934 he returned to New York with said share where he remained with said share until his death in 1937 (R. 69-71). Decedent ap-

pointed said share to his wife. Decedent's share of the trust fund was wholly comprised of intangible personal property (R. 38-51). The appointed property has been treated by decedent's executors in all respects as part of the decedent's estate (R. 65).

The State Tax Commission of New York contended before the Surrogate on its appeal to him from a *pro forma* taxing order, that the appointed property should be included in decedent's gross estate for purposes of the estate tax imposed by Article 10-C of the Tax Law, under the provisions of subdivision 7 of section 249-r of said law (added by Chapter 710, Laws 1930, and amended by Chapter 639, Laws of 1934). A copy of said section, so far as relevant, is annexed as Appendix A. The respondents contended throughout that New York had no jurisdiction to tax the exercise of power since it had been created by a nonresident donor and that said subdivision violated the Fourteenth Amendment.

The Surrogates' Court of the County of New York excluded the appointed property from decedent's gross estate, upon the authority of *Wachovia Bank & Trust Company* v. *Doughton*, 272 U. S. 567 (R. 10-21, 192-202). The action of said court was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department (R. 217-220), and by the Court of Appeals. The remittitur of the Court of Appeals states that "A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in the proceeding, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that the statute aforesaid, as sought to be applied in this proceeding is violative of,

and repugnant to the Fourteenth Amendment of the Constitution of the United States."

B.

Question Presented.

Whether the Fourteenth Amendment prohibits a State from imposing an estate tax with respect to intangible personal property passing under the testamentary exercise by a resident decedent of a general power of appointment, where the power had been created by a nonresident and said property is held in trust and administered within the taxing State.

C.

Reasons Relied on for Allowance of Writ.

1. The decision of the Court of Appeals that the statute as sought to be applied herein violates the Fourteenth Amendment is not in accord with the decisions of this Court upholding the power of the State of domicile of the owner of intangible personal property to subject such property to death taxation, or the decisions of this Court upholding the power of the State where intangible personal property is held and administered by trustees, to subject such property to death taxation. The decision is contrary to principles announced in *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Pearson* v. *McGraw*, 308 U. S. 313; and *Stewart* v. *Commonwealth of Pennsylvania*, 338 Pa. 9, affirmed 85 L. Ed. 389.

2. The question of whether the domicile of a donee of a power of appointment has jurisdiction to impose a death tax with respect to intangible personal property passing under such exercise, where the power was created by a nonresident of the taxing State, is one of general importance

and concern to the States and to taxpayers. It should be decided by this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued directed to the Surrogates' Court of the County of New York, commanding that court to certify and send to this Court on the day certain to be therein specified, a full and complete transcript of the record and all proceedings of said Surrogates' Court in this action which was entitled in said court: "In the Matter of the Estate Tax upon the Estates of Eugene V. R. Thayer, Deceased," to the end that said case may be reviewed and determined by this Court, as provided by law, that the decree of said court be reversed, and that your petitioners have such other and further relief as to this Honorable Court may seem just and proper.

MARK GRAVES,
JOHN P. HENNESSEY,
JOSEPH M. MESNIG,
As Commissioners Constituting the State Tax Commission of the State of New York,
MORTIMER M. KASSELL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

There was no opinion by the Appellate Division or the Court of Appeals. The opinion of the Surrogates' Court (R. 192-202) is reported in 172 Misc. at page 426.

Jurisdiction.

The decree of the Surrogates' Court herein sought to be reviewed was entered on July 10, 1941, upon the remittitur of the Court of Appeals of the State of New York dated June 19, 1941.

The judgment of the Court of Appeals was rendered in a cause wherein there was directly involved the validity, under the Fourteenth Amendment of the Constitution of the United States, of paragraph 7 of section 249-r of the Tax Law of the State of New York.

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 937 (§ 344, Title 28, U. S. C. A.) and Act of February 13, 1925, c. 229, § 8, 43 Stat. 940 (§ 350, Title 28, U. S. C. A.).

Statement of the Case.

The facts are fully set forth in the petition herein (see pp. 2-4).

Specification of Errors.

1. The Court of Appeals erred in applying the principles established by this Court in its applicable decisions to the facts in this proceeding.

2. The Court of Appeals erred in holding that the imposition of a State estate tax, with respect to intangible personal property passing under the testamentary exercise

of a power of appointment by a resident decedent, where the power had been created by a nonresident, was in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court of Appeals erred in not holding that subdivision 7 of section 249-r of the Tax Law of the State of New York as herein applied was valid.

Summary of Argument.

A. The Court of Appeals did not give effect to the applicable decisions of this Court, since the Fourteenth Amendment does not prohibit the State of domicile of a donee of a power of appointment over intangible personal property, from imposing an estate tax with respect to the testamentary exercise of such power, even though it had been created by a nonresident donor.

B. The Court of Appeals did not give effect to the applicable decisions of this Court, since the Fourteenth Amendment does not prohibit the State of domicile of a donee of a power of appointment over intangible personal property, from imposing an estate tax with respect to the testamentary exercise of such power, even though it had been created by a nonresident donor, where such property is held in trust within the taxing State.

Point I.

The decision by the Court of Appeals is not in accord with the applicable decisions of this Court.

Article 10-C of the Tax Law of the State of New York imposes an estate tax upon the transfer of the net estate of decedents. It was modeled on the estate tax imposed by the United States Revenue Act of 1926, and by section 249-r provides for the determination of the gross estate

by including therein various items. By paragraph 7 of said section, there is required to be included in the gross estate, the value of all property "passing under a general power of appointment exercised by the decedent (a) by will."

There is no question that section 249-r of the Tax Law by its terms requires the inclusion in the gross estate of decedent of the property which passed under his testamentary exercise of the general power of appointment.

It is clear that property passing under the exercise of a power of appointment may be included in the measure of an estate tax. The power to transmit property by way of a power of appointment is equivalent, for purposes of taxation, to an absolute power of disposition. The death of the donee of a power effects a shifting of economic benefits in property by which the appointees acquire economic interests therein, justifying the imposition of a death tax.

Whitney v. *State Tax Commission*, 309 U. S. 530;
Curry v. *McCanless*, 307 U. S. 357;
Porter v. *Commissioner*, 288 U. S. 436;
Chanler v. *Kelsey*, 205 U. S. 466;
Orr v. *Gilman*, 183 U. S. 278.

The question presented here is whether the Fourteenth Amendment prohibits a State from imposing a tax in the estate of a resident decedent in respect of intangible personal property which passed under his exercise of a general power of appointment, where the power had been created by a nonresident decedent. The Court of Appeals has concluded that a State is so prohibited.

The conclusion of the Court of Appeals ignores the principle, recently reaffirmed, that the transfer at death of intangible personal property is subject to tax at the domicile of the "owner"—the person possessing the power of

disposition—since it is the domicile which affords protection and opportunities and which confers benefits upon him.

Curry v. *McCanless, supra,* 307 U. S. 357;
Graves v. *Elliott,* 307 U. S. 383;
Pearson v. *McGraw,* 308 U. S. 313.

In *Curry* v. *McCanless, supra,* this Court, in upholding the power of Tennessee to tax the testamentary exercise by a resident decedent of a power of appointment over a fund held in trust in Alabama, said (pp. 366-7):

> "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax."

In *Graves* v. *Elliott, supra,* a New York decedent had a power of revocation over a trust of intangible personal property held in Colorado. In upholding the power of New York to subject to the estate tax, the relinquishment of such power at death, it was said (p. 387):

> "As in the case of any other intangibles which she possessed, control of her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death."

In *Pearson* v. *McGraw, supra,* this Court upheld the right of Oregon to impose a tax on a transfer by a resident of property held in Illinois, saying (p. 318):

> "Accordingly, the transfer was taxable on the authority of *Curry* v. *McCanless, supra,* and related cases. For constitutionally the property was 'within the jurisdiction of the state' of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner."

To the same effect, *Van Dyke* v. *Wisconsin Tax Comm.*, 311 U. S. 605.

Insofar as the jurisdiction of New York to impose a tax is founded solely on the fact that the decedent was domiciled therein at the time of his death, it is opposed to the decision in *Wachovia Bank and Trust Co.* v. *Doughton*, 272 U. S. 567. Petitioners submit that, as indicated by the dissenting opinion of Mr. Justice Holmes in that case, it cannot stand with *Bullen* v. *Wisconsin*, 240 U. S. 625. The recent affirmance of the *Bullen* case by *Graves* v. *Elliott, supra,* 307 U. S. 383, requires a reconsideration of the conclusion in the *Wachovia* case.

The decision by the Court of Appeals is contrary to the decisions of this Court for a wholly different reason. Not only has this Court upheld the taxing power of the State of domicile of the owner, but it has also upheld the taxing power of the State where intangible personal property is held in trust and administered. Since the intangible personal property here in question was held in trust in New York and administered by the decedent as trustee in New York, the denial by the Court of Appeals of the power to tax is not in accord with the applicable decisions of this Court.

Curry v. *McCanless, supra,* 307 U. S. 357;
Graves v. *Elliott, supra,* 307 U. S. 383;
Safe Deposit and Trust Co. v. *Virginia*, 280 U. S. 83.

In the *Curry* case this Court also upheld the power of Alabama to impose a death tax with respect to intangible personal property held in the possession of the trustees in that State, saying (p. 370):

> "This Court has never denied the constitutional power of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), § 602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state."

Hence, whether grounded on jurisdiction over the person or jurisdiction over the property, the decisions of this Court clearly uphold the power of New York to impose the tax here questioned.

Point II.

This petition presents a question of general importance meriting the consideration of this Court.

In 1926 in *Wachovia Bank & Trust Company* v. *Doughton*, 272 U. S. 567, a majority of this Court held that the State of a donee's domicile was without power to impose a death tax upon the exercise of a power of appointment over intangible personal property where the power had been created by a nonresident donor, upon the ground that such property had "no situs, actual or constructive" in the taxing State. This limitation on the taxing power of States has been of major importance to State revenues since the statutes of over thirty States by their terms assert a tax

on the exercise of a power of appointment.* Since that decision these States have been without power to tax where the power was created by a nonresident donor. However, the decisions in *Curry* v. *McCanless* and *Graves* v. *Elliott* have raised grave doubts in the minds of State taxing authorities, taxpayers, their representatives and academic writers on the question. Thus, the Attorney General of Kentucky (Commerce Clearing House Inheritance, Estate and Gift Tax Service, Supplemental Volume, New Matters, 1938-1940, Par. 8399) has held in effect that the *Curry* case has overruled the *Wachovia* case. Similarly, the doubts have been otherwise expressed. In 53 *Harvard Law Review* 1013, at page 1017, it is said in reference to the *Wachovia* case:

> "Though not overruled expressly, in view of the *ratio decidendi* of *Curry* v. *McCanless*, this decision appears no longer to be law."

In 38 *Michigan Law Review* 81, it is said of the *Wachovia* case that it

> "is virtually overruled by *Curry* v. *McCanless* and *Graves* v. *Elliott*."

In 14 *St. Johns Law Review* 195, at page 199, it is said:

> "Because of the holdings in the instant cases (referring to *Curry* v. *McCanless* and *Graves* v. *Elliott*), the effect of those decisions which defeated double taxation has been considerably weakened. Consequently, the *Wachovia* and the *Safe Deposit and Trust Company*

---

* Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin (California and Massachusetts under qualified circumstances), (Commerce Clearing House Inheritance, Estate and Gift Tax Service, Seventh Edition, pp. 81,029, 81,030).

cases are in a questionable light, and it appears as if the *Bullen* v. *Wisconsin* case is once more acceptable law."

In 25 *Cornell Law Quarterly* 642, at page 645, the writer concludes:

> "As a result of the decision in *Curry* v. *McCanless* we may expect increased taxation by the state of the donee's domicile. The line of cases following the *Wachovia Bank* case, of which *Matter of Thayer* (referring to the decision of the Surrogate in the instant proceeding) is the latest, seems destined to be overruled."

In the present state of the law, great confusion exists. Taxing authorities are uncertain how to protect State revenues, and persons desiring to create or exercise powers of appointment are also without a reliable guide for their conduct. The orderly administration of the tax laws of the several States, the protection of State revenues, and the interests of individual citizens all make it imperative that the question in this proceeding be answered by this Court at the earliest possible moment.

Conclusion.

Petitioners pray that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

MORTIMER M. KASSELL,
Counsel for Petitioners.

APPENDIX A.

§ 249-r. Gross estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

* * * * * * *

7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, or (c) by deed under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *.

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MORTIMER M. KASSELL,
Counsel for Petitioners.

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BRIEF FOR PETITIONERS.

Opinions of the Court Below.

The opinion of the Surrogates' Court of the County of New York is reported at 172 Misc. 426. No opinion was written either by the Appellate Division of the Supreme Court or by the Court of Appeals of the State of New York.

Jurisdictional Grounds of the Writ of Certiorari.

(1) The date of the order to be reviewed is July 10, 1941 and said order is printed at R. 54-56.

(2) The Court's jurisdiction is founded on the fact that the respondents asserted in all the Courts below, that for New York to impose its estate tax with respect to the exercise of a testamentary power of appointment by the decedent over intangible personal property was a deprivation of property without due process of law under the Fourteenth Amendment of the Constitution of the United States, because the power had been created by a non-resident of that state. The Surrogates' Court of New York County excluded the appointed property from decedent's gross estate upon the authority of *Wachovia Bank and Trust Co. v. Doughton*, 272 U. S. 567 (R. 46-49). The Appellate Division of the Supreme Court unanimously affirmed (R. 50-51). The remittitur of the Court of Appeals, dated June 19, 1941, states, in part, (R. 54):

> "A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in this proceeding, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that the statute as aforesaid, as sought to be applied in this proceeding is violative of, and repugnant to, the Fourteenth Amendment of The Constitution of the United States."

(3) Jurisdiction of this Court is invoked under section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 937 (§344, Title 28, U. S. C. A.), and Act of February 13, 1925, c. 229, §8, 43 Stat. 940 (§350, Title 28, U. S. C. A.).

(4) The following cases sustain the jurisdiction of this Court:

Carpenter et al. v. Pennsylvania, 17 How. 456;
Bullen v. Wisconsin, 240 U. S. 625;

Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69;
Public Utilities Commission of Rhode Island et al. v. Attleboro Steam & Electric Company, 273 U. S. 83;
Blodgett v. Silberman, 277 U. S. 1;
Virginia v. Imperial Coal Sales Co., Inc., 293 U. S. 15;
Graves v. Elliott, 307 U. S. 383.

Statement of the Case.

This case presents the question of whether a statute of the State of New York which includes in a resident decedent's gross estate, for purposes of its estate tax, intangible personal property passing under the exercise by will by such decedent of a general power of appointment created by a nonresident, is repugnant to the Constitution of the United States.

The decedent, Eugene V. R. Thayer, died a resident of the State of New York on January 1, 1937 (R. 6). His will was admitted to probate by the Surrogates' Court of New York County, and letters of administration issued to Carl J. Schmidlapp and Elizabeth E. Gorrie (R. 6). By paragraph "Fifth" of his will, he exercised a general power of appointment given him under his father's will (R. 10).

The trust fund over which the decedent exercised the power of appointment had been created by the will of his father, Eugene V. R. Thayer, Sr., who died a resident of Massachusetts on December 20, 1907, and whose will was admitted to probate in Worcester County of that State (R. 10). Under the father's will, his residuary estate was

bequeathed in trust with income therefrom payable to his widow for life and then to his three children for their lives with power in Eugene V. R. Thayer, decedent herein, to appoint by will his share of the principal (R. 22).

Decedent was one of the three trustees under his father's will of the entire trust fund and the fund was originally managed as a unit. However, on July 8, 1911, decedent's one-third share of the fund was segregated with the approval of the other trustees and adult beneficiaries, and was thereafter managed by him as a separate trust, although under the nominal trusteeship of all three trustees (R. 10). In 1918 decedent moved to New York bringing with him his share of the trust fund. While in New York decedent kept the physical evidences of his share of the fund in a safe deposit box in New York, N. Y. In 1929 he moved to Illinois where he remained until 1934 still having with him his share of the trust fund. In 1934 he returned to New York, N. Y., with said share where he remained with it until his death in 1937 (R. 14). Decedent appointed said share to his wife. Decedent's share of the trust fund consisted wholly of intangible personal property and was valued at $1,066,307.99 (R. 8-10). The appointed property has been treated by decedent's executors in all respects as part of decedent's estate (R. 13).

The Surrogates' Court of the County of New York, excluded the appointed property from the gross estate of the decedent for purposes of the estate tax imposed by Article 10-C of the Tax Law of the State of New York (R. 2-3, 46-49). The order of said Surrogates' Court was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department (R. 50-51), and the State Tax Commission ap-

pealed to the Court of Appeals of the State of New York (R. 49-50). The Court of Appeals affirmed and remitted the matter to said Surrogates' Court (R. 53-54), which thereupon made the order here under review excluding the value of the appointed property from the decedent's gross state (R. 54-55). This Court granted certiorari on October 27, 1941 (R. 56).

Specifications of Errors.

The petitioners herein allege that the Surrogates' Court of New York County erred in determining, in accordance with the decision of the Court of Appeals, that the State of New York is without power, under the Fourteenth Amendment of the Constitution of the United States, to impose an estate tax with respect to intangible personal property passing under the testamentary exercise by a resident decedent of a general power of appointment where the power had been created by a nonresident.

The petitioners herein allege that the Surrogates' Court of New York County erred in determining, in accordance with the decision of the Court of Appeals, that the State of New York is without power, under the Fourteenth Amendment of the Constitution of the United States, to impose an estate tax with respect to intangible personal property passing under the testamentary exercise by a resident decedent of a general power of appointment where the property is held in trust and administered within the taxing state.

Preliminary Statement.

The Tax Law of the State of New York, by section 249-n thereof, imposes an estate tax "upon the transfer of the

net estate" of resident decedents. Said tax is modeled after the Federal estate tax imposed by the United States Revenue Act of 1926. Section 249-r of the Tax Law provides for determining the gross estate by including the value of various items of property. By section 249-s, various deductions are allowed from the gross estate for the purpose of determining the net estate. The tax is imposed on the net estate at the graduated rates provided for in section 249-n of the Tax Law.

By paragraph 7 of said section 249-r, there is required to be included in the gross estate, the value of property passing under the exercise by will of a power of appointment. It is not disputed that, under the terms of said paragraph, the property passing under the exercise by the decedent includible in his gross estate.

Summary of Argument.

1. A decedent who possesses a testamentary power of appointment is properly considered as the owner of the appointive property, since his death occasions the shifting of economic benefits in such property in the same way as it would if he had owned the property in fee.

2. The due process clause of the Fourteenth Amendment to the United States Constitution does not prohibit New York from imposing an estate tax with respect to intangible personal property passing under the exercise of a power of appointment by a resident donee, even though the power had been created by a nonresident, since such donee received benefits and protection from New York.

3. Since the appointive property was held and administered in New York, the due process clause of the Fourteenth

Amendment to the United States Constitution does not prohibit New York from imposing its estate tax with respect to such property.

FIRST.

The decedent was, for purposes of taxation, the "owner" of the appointed property.

Article 10-C of the New York Tax Law is an estate tax modeled after the death tax imposed by the United States. It is a tax on the shifting of the economic benefits in property which is occasioned by the person's death, and is graduated in accordance with the amount of property so transferred. It is not necessary that such property be owned by the decedent but only that his death be the occasion by which economic benefits therein are shifted. Thus, it has been held proper to include in a decedent's gross estate, for purposes of an estate tax, the proceeds of life insurance (*Chase National Bank v. United States*, 278 U. S. 327); the full value of property in which the decedent was a joint tenant (*United States v. Jacobs*, 306 U. S. 363); the full value of property in which the decedent was a tenant by the entirety (*Tyler v. United States*, 281 U. S. 497); the value of property in a trust subject to a limited power to alter, amend or revoke (*Bullen v. Wisconsin*, 240 U. S. 625; *Porter v. Commissioner*, 288 U. S 436). By the same reasoning, the constitutional propriety of subjecting to death taxation property passing under the exercise of a testamentary power of appointment, general or limited, created by another was determined by this Court in *Whitney v. State Tax Commission*, 309 U. S. 530; *Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey*, 205 U. S. 466. These cases recognized that it is the donee's act which

completes the transfer of the property from the dead to the living.

At the death of the decedent herein he had the right, which he exercised, to dispose of his share of the trust fund created under the will of his deceased father. In so far as decedent's power to direct the passing of the property from himself to his survivors was concerned, it was absolutely immaterial whether the decedent owned the property outright or only had a power of appointment over it. His death occasioned the shifting of the economic benefits in such property in the same way that it caused the shifting of the economic benefits in property which he owned in fee.

It is clear that paragraph 7 of section 249-r of the New York Tax Law* requires the inclusion of the appointed fund in decedent's gross estate. The precise point at issue is whether the statute is invalid because the power had been created by a nonresident donor.

SECOND.

A state statute imposing an estate tax with respect to property passing under the exercise by a resident decedent of a power of appointment is not violative of the due process clause of the Federal Constitution, even though the power had been created by a nonresident.

Petitioner submits that the power of New York to tax is no more restricted by the Fourteenth Amendment than

* Section 249-r of the Tax Law of New York, so far as relevant, provides:

"§ 249-r. Gross estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *;

* * * * *

"7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will * * *."

its power to impose a death tax on intangible personal property owned by a domiciliary decedent but located elsewhere. Decisions of this Court have established the broad power of the state of domicile to impose death taxes on such intangibles. The state of domicile has power to tax the transfer at death of: a bank account in another state (*Baldwin v. Missouri*, 281 U. S 586); intangibles in a safe deposit box in another state (*Blodgett v. Silberman*, 277 U. S. 1); bonds of foreign municipalities (*Farmers' Loan & Trust Company v. Minnesota*, 280 U. S. 204); stock of a foreign corporation (*First National Bank of Boston v. Maine*, 284 U. S 312); indebtedness and unpaid dividends owing a decedent by a corporation controlled by him and doing business in another state (*Beidler v. South Carolina Tax Commission*, 282 U. S. 1); an interest in a partnership engaged in business in another state (*Blodgett v. Silberman, supra*); the relinquishment at death of a power of revocation over a trust held in another state (*Graves v. Elliott*, 307 U. S 383); the exercise by a decedent of a general power of appointment created by him over property held in another state (*Curry v. McCanless*, 307 U. S. 357).

The interest of the decedent in the case at bar cannot be distinguished from those of the decedents in the above cited cases. Decedent possessed the same power of testamentary disposition as if the intangible personal property in the trust fund was in a safe deposit box in another state or if he had created the trust over which he had the power of appointment.

The conclusion of the courts below that, under the due process clause of the Federal Constitution, New York has no jurisdiction to impose a tax with respect to the exercise of the power of appointment by a resident decedent,

because the donor of the power had been a nonresident ignores the principle that the transfer at death of intangible personal property is subject to tax at the domicile of the person who has the power of disposition.

Bullen v. Wisconsin, 240 U. S. 625;
Curry v. McCanless, supra, 307 U. S. 357;
Graves v. Elliott, supra, 307 U. S. 383;
Pearson v. McGraw, 308 U. S. 313.

In *Bullen v. Wisconsin, supra*, the inheritance tax of Wisconsin on property held in trust in Illinois was upheld where the decedent had power to control the disposition of the trust fund. This Court said (p. 631):

> "What we do say is that the Supreme Court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute, that there is no constitutional objection to its doing so, and that although Illinois also has taxed the fund, as it might, we are not aware that it has attempted to qualify the effect that Wisconsin has given to the power, and do not intimate that it could have done so, if it had tried. * * *"

In *Curry v. McCanless, supra*, Tennessee asserted a tax on the testamentary exercise by a resident decedent of a power of appointment over intangible personal property held in trust in Alabama. In holding that such a tax was not a violation of due process of law, this Court said (pp. 366-7):

> "The power of government over them [intangibles] and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * * Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exer-

cise—they cannot be dissociated from the persons from whose relationships they are derived.

"* * * From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. * * *"

Again, the Court said (p. 372):

"So far as the power of Tennessee to tax the exercise of the power of appointment is concerned, there is no substantial difference between the present case and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state are physically present in another."

In *Graves v. Elliott, supra,* 307 U. S. 383, in upholding the power of New York to tax the relinquishment of a power of revocation at death, this Court said (pp. 386-7):

"For reasons stated in our opinion in *Curry v. McCanless, supra,* we cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles. Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the

support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death."

In *Pearson v. McGraw, supra,* 308 U. S. 313, this Court upheld the right of Oregon to impose a tax on a transfer by a resident, of property held in Illinois, saying (p. 318):

"Accordingly, the transfer was taxable on the authority of *Curry v. McCanless, supra,* and related cases. For constitutionally the property was 'within the jurisdiction of the state' of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner."

The principle enunciated in the foregoing cases was similarly expressed in *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, where this Court said (pp. 444-5):

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the

state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. See *Continental Assurance Co. v. Tennessee, supra.* See also *Equitable Life Society v. Pennsylvania,* 238 U. S. 143; *Maxwell v. Bugbee,* 250 U. S 525; *Compania de Tabacos v. Collector,* 275 U. S. 87, 98; *New York ex rel. Cohn v. Graves,* 300 U. S. 308; *Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412; *Atlantic Refining Co. v. Virginia,* 302 U. S. 22; *Curry v. McCanless,* 307 U. S. 357. * * *"

Petitioners submit that New York has jurisdiction to tax in the case at bar. The decedent, having been domiciled there at the time of his death and having possessed and exercised the power of testamentary disposition there, was subject to the control of that State, and, hence, was under a duty to contribute to the support of the government of New York. New York, therefore, is justified in measuring the estate tax imposed in decedent's estate by the sum total of the property shifting at decedent's death, including the intangible personal property which passed to his beneficiaries under the exercise of the power of appointment.

In *Stewart v. Pennsylvania,* 312 U. S. 649, this Court upheld the power of Pennsylvania to tax the beneficial interest of a life tenant in a trust created by a nonresident and held and administered outside the taxing state. The life tenant's beneficial interest there was in Pennsylvania, as the decedent's power of disposition here was in New York.

In an attempt to avoid the necessary conclusion from the foregoing, respondents concede that, while the domicile

of the donee of the power of appointment can tax where the donee was also the donor, yet where the donee and the donor are different they insist that the donee's domicile lacks jurisdiction to tax.

Respondents' distinction is invalid. The operative fact is control over the person who possesses the power of testamentary disposition, regardless of the source of power.

The fact that the donee of the power in the *Curry* case was also the donor does not distinguish such case from the case at bar. In the *Curry* case the decedent having irrevocably conveyed property in trust she had at death only the right of testamentary disposition of such power, and it was the exercise of that right which Tennessee taxed. "Exercise of that power * * * was made a taxable event by the statutes" of Tennessee. This Court upheld the Tennessee tax because the right of the decedent to dispose of the trust property—the only attribute of ownership of such property that she possessed at death—adhered to her person at her domicile in Tennessee. But this right would have been the same if the power of disposition had been created by some one else. It cannot be that Tennessee would be without power to tax if decedent's father had created a trust in Alabama giving the decedent the power of appointment, but can tax if instead he gave the property to the decedent, who, in turn, created a trust there but reserving a power of appointment.

Petitioners concede there is a slight difference between a power created by the donee himself and one created by another in that, in the former case, the donee can during his lifetime appoint to creditors and, in the latter, the donee, although he can in fact appoint to his creditors, cannot contract to do so. However, this difference is unimportant.

It cannot be that jurisdiction to tax depends on such a negligible factor any more than it did in *Whitney v. State Tax Commission, supra*, 309 U. S. 530. There this Court upheld the estate tax imposed by New York on the exercise of a limited power of appointment. In so doing it overruled the contention that no tax was impossible because the donee of a limited power could not benefit himself, saying (pp. 538-9):

> "In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall."

Again, respondents concede that while the domicile of a donee of a power of appointment, exercisable by deed or by will, can tax regardless of the source of the power, yet they insist that the donee's domicile lacks jurisdiction where the power is only exercisable by will because the donee cannot benefit himself during life. The invalidity of respondents' distinction has been pointed out in *Whitney v. State Tax Commission, supra*, where this Court upheld the power of a state to consider a power of appointment that could not be utilized to benefit the donee as equivalent to ownership for purposes of taxation. Furthermore, this contention ignores the fact that the estate tax imposed by New York is measured by the amount of property over which a decedent has the power of testamentary disposition. It is not measured merely by the extent of decedent's rights during his life in such property. There is validly

taxed the face value of life insurance and not merely the surrender value which the decedent had during his lifetime. There is validly taxed the full value of property passing under the exercise of a limited power under which the decedent cannot benefit himself and where the power of testamentary disposition is narrowly restricted. There is validly taxed the full value of property, even though owned by decedent as a tenant by the entirety or as a joint tenant. In theory and in fact, the full value of property is included because, in so far as the power to distribute property to a decedent's beneficiaries is concerned, an individual who owns two million dollars outright has no more to transmit to his beneficiaries at his death than has an individual who owns only one million dollars outright but has a testamentary power of appointment over another million dollars.

Respondents have asserted that the minority opinion of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis and Mr. Justice Stone, in *Wachovia Bank & Trust v. Doughton, supra,* 272 U. S. 567, was based on the erroneous view that the donee of a testamentary power of appointment could contract to execute the power and, hence, benefit himself. Nothing in that opinion indicates that these judges would have concurred with the majority, even if they had believed that the donee could not contract to execute the power. Time has not resolved the difficulty, expressed in the minority opinion; of reconciling the *Wachovia* decision with *Bullen's* case. Furthermore, the subsequent dissenting or minority opinions in *Farmers' Loan & Trust Company v. Minnesota, supra,* 280 U. S. 204; *Baldwin v. Missouri, supra,* 281 U. S. 586; *Beidler v. South Carolina Tax Commission, supra,* 282 U. S. 1; *First National Bank of Boston v. Maine, supra,* 284 U. S. 312; indicate a far broader basis for the disagreement of the min-

ority. In any event, the *Wachovia* case was decided when it was believed that the Fourteenth Amendment prohibits more than one tax on the transfer of property at death. The decisions in *Curry v. McCanless, supra,* and *Graves v. Elliott, supra,* have demonstrated that premise to be erroneous. (See 53 Harvard Law Review 1013.)

Respondents assert that no "privilege" was conferred by New York in the case at bar and, hence, New York is without jurisdiction to tax. This Court, in its decision in the *Curry* case, did not justify the right of Tennessee to tax on any privilege of transmission conferred by that State. The Tennessee tax was justified by reason of the benefits conferred upon the decedent and her obligation to contribute to her state of domicile. The proposition sought to be achieved by respondents, that the granting of the privilege of transmission is necessary for a state to impose a tax measured by such property, is not valid.

Neither the distinctions respondents seek to make, nor the limitations they would read into *Curry v. McCanless, supra,* and *Graves v. Elliott, supra,* add to a logical pattern of taxation.

THIRD.

A state statute imposing an estate tax with respect to property passing under the exercise by a resident decedent of a power of appointment is not violative of the due process clause of the Federal Constitution, even though the power had been created by a nonresident, where the property is within the jurisdiction of such state.

A state's jurisdiction to tax extends to all property within its borders. In respect to real and tangible personal

property, a state has exclusive jurisdiction to impose taxes on the transfer thereof at death. The situation is somewhat different in respect to death taxation on the transfer of intangible personal property. It may be that intangibles are subject to such taxation ordinarily only at the domicile of the person who has the power of testamentary disposition over them.

First National Bank of Boston v. Maine, supra, 284 U. S. 312;

Beidler v. South Carolina Tax Commission, supra, 282 U. S. 1;

Baldwin v. Missouri, supra, 281 U. S. 586;

Farmers' Loan & Trust Company v. Minnesota, supra, 280 U. S. 204.

However, it is clear that when intangibles are brought within the protection of the laws of another state such other state is not deprived of its jurisdiction to tax by anything found in the Fourteenth Amendment.

Curry v. McCanless, supra, 307 U. S. 357;

Cf., Graves v. Elliott, supra, 307 U. S. 383;

Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83;

New Orleans v. Stempel, 175 U. S. 309;

Bristol v. Washington County, 177 U. S. 133;

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346;

New York ex rel. Whitney v. Graves, 299 U. S. 366.

In the case at bar, the decedent determined that it was to his advantage to manage his share of the trust fund as a separate trust. This was done with the knowledge and consent of the other trustees. The decedent also found it

advantageous to change his domicile from Massachusetts to New York, and, in so doing, he brought with him his share of the trust fund to New York where it was given the protection and benefit of the laws of New York. He had the property in New York for almost fifteen years, and it had not been in Massachusetts for almost twenty years prior to his death. Decedent could sue or be sued as trustee in the courts of New York. It cannot be questioned that, if New York imposed a personal property tax, it could have assessed the tax on this property which was managed, controlled and administered in New York. Petitioners, therefore, submit that the trust property was within New York's taxing power, and that the tax imposed on the transfer thereof at decedent's death does not conflict with the Fourteenth Amendment.

In *Curry v. McCanless, supra*, this Court upheld not only the right of the domicile of the donee of the power to impose a death tax on its exercise (Tennessee), but it also upheld the right of the domicile of the trustee of the appointive fund to impose such a tax (Alabama). In so doing, this Court said (p. 370):

> "If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, see *New York ex rel. Cohn v. Graves, supra*, 313; *First Bank Stock Corp. v. Minnesota, supra*, 241, legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on it a tax measured by their value. We can find no more ground for saying that the Fourteenth Amendment relieves it, or the property which it holds and administers in Alabama, from bearing that burden, than for saying that they are constitutionally immune from paying any other expense which normally attaches to the administration of a trust in that state. This Court has never denied the constitutional power

of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), §602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state."

Petitioners submit that this case is governed by *Curry v. McCanless, supra*, and it is no distinction to say that in that case the decedent was both donee and donor of the power. Alabama's right to tax was upheld, although it had no jurisdiction over the decedent, either as donor or as donee, but simply because the property was in the hands of a trustee resident there.

It is also of no moment, as respondents have suggested, that in the *Curry* case the appointive fund had been held in Alabama during all of the trust term, but in the case at bar the appointive fund, although here at the time of the exercise, was out of the State during several of the years of the trust term. Certainly the decision in the *Curry* case would have been the same if the decedent there had originally named Georgia trustees and shortly before her death removed them and substituted the Alabama trustees. The only important fact, from the view of jurisdiction to tax, is the place where the property is managed and controlled at the time of the transfer.

Respondents have urged that it has never been decided whether the New York one-third of the property passed under the exercise of one-third of the entire residuary estate so passed. Petitioners submit, under this point, that

it is clear that the New York one-third passed under the exercise, but, even if respondents' contention be granted, it only leads to the conclusion that, since one-third of the entire residuary estate was held and administered in New York, then at least one-ninth of the property is taxable because of the fact that it was located in New York.

Respondents have contended that New York is without power to tax because the devolution of the appointive property is governed by the laws of the domicile of the donor. This statement is inaccurate, for it is the law of the state having control of the property which governs its devolution, although as an almost universally accepted rule, such state, for reasons of comity, applies the law of the donor's domicile (*Bullen v. Wisconsin, supra; Frick v. Pennsylvania*, 268 U. S. 473; *cf. Riley v. New York Trust Company*, United States Supreme Court, February 16, 1942).

Conclusion.

For the reasons above stated, it is submitted that the order of the Surrogates' Court of New York County was in error in excluding from decedent's gross estate the value of the intangible personal property passing under the power of appointment exercised by decedent.

Respectfully submitted,

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